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**CHONG SANG****v.****AH KOW**

HIGH COURT MALAYA, JOHOR BAHRU

MAHADEV SHANKAR J

[ORIGINATING MOTION NO. 43 OF 1984]

9 DECEMBER 1984

**LAND LAW:** *Removal of caveat - Application for - Caveatable interest - Right to register transfer of land - Interest in land.*

On 12 July 1978, the plaintiff borrowed RM35,400 from the defendant. Having received the money, the plaintiff signed a formal agreement. The security for the loan was that the plaintiff should sign a transfer transferring to the defendant his land comprised in Grant No. 25787 for Lot 9200 in the Township of Johor Bahru, on which is built a house No. 63 Jalan Usaha, Century Garden, which is the plaintiff's residence. The transfer was duly signed and deposited with M/s. Nathan and Yang, Advocates and solicitors, Johor Bahru, as stake-holders. Repayment of the loan was to be by 11 July 1979, otherwise the defendant as lender has power to register the transfer of the said land in his favour. Upon expiry of the loan agreement, the parties were empowered to extend the term for any mutually agreed period. In that event, the defendant was to auction the land, deduct what was due to him and refund the balance to the plaintiff. Time was made of the essence of the agreement.

The plaintiff failed to repay the loan before 11 July 1979. On or about 29 April 1980, the defendant applied for a private caveat to be entered against the said land. Thereafter the plaintiff filed notice requiring the caveat to be removed. There was some difficulty in serving the notice. On 5 November the plaintiff filed the application to remove the caveat by way of Originating Motion.

**Held:**

The defendant's right to transfer the said land in his favour is an interest in land which is a caveatable interest.

*[Plaintiff's application dismissed with costs.]*

**Case referred to:**

*Haji Abdul Rahman v. Mohamet Hassan [1917] AC 209*

**Legislation referred to:**

National Land Code 1965, s. 205

*For the plaintiff - C.R. Lim; M/s. Lim & Teng*

*For the defendant - C.S. Tham; M/s. Nathan & Yang*

**JUDGMENT****Mahadev Shankar J:**

This is an application for the removal of a caveat. The facts are as follows. On the 12 July 1978 the plaintiff borrowed RM35,400 from the defendant. Having received the money he solemnly signed a formal written agreement. This agreement stipulated that the plaintiff should by way of security for the loan sign a transfer transferring to the lender his land comprised in Grant No. 25787 for Lot 9200 in the Township of Johor Bahru (hereafter referred to as the

*a* said land). On it is a house No. 63 Jalan Usaha, Century Garden, Johor Bahru in which the plaintiff then resided and continues to reside to this day. Having signed the agreement the plaintiff also signed the transfer form as required, and deposited the same with M/s. Nathan and Yang, Advocates and solicitors, Johor Bahru who held them as stake-holders.

*b* The agreement further provided that the loan should be repaid by the 11 July 1979. If the plaintiff failed so to do the defendant as the lender was specifically empowered to reserve his right to register the transfer of the said land in his favour.

Upon expiry of the loan agreement the parties were empowered to extend the term for any mutually agreed period. In that event the agreement provided that the defendant was to auction the land, deduct what was due to him and refund the balance to the borrower. Clause 6 of the agreement is not quite clear in its meaning but since I must construe the agreement to give it efficacy I take this clause to mean the defendant is to auction the property only upon expiry of the loan agreement.

*c* Now the borrower did not pay the loan on or before the 11 July 1979 as stipulated in the agreement notwithstanding the time was made of the essence of the agreement. In fact there is no evidence whatsoever before me that even up till today he has paid anything at all towards this loan.

*d* On or about 29 April 1980 the defendant applied for a private caveat to be entered against the said land. The grounds of his claim were stated in the application as follows:-

*e* (a) By an Agreement dated 12 July, 1978 and entered into between the Registered Owner CHONG SANG @ CHONG SUM SENG and myself, the Registered Owner has agreed to take a loan of RM35,400 free from interest on the security of the land described in the schedule hereto.

(b) I have paid the sum of RM35,400 to the Registered Owner.

(c) The Registered Owner has agreed to transfer the said property to me in the event of default of repayment of the said sum.

(d) I am lodging this Caveat to protect my interests in the said land.

*f* Thereafter on 31 May 1983 the plaintiff filed a notice requiring the caveat to be removed. There was some difficulty in serving the notice and on 5 November the plaintiff filed a notice of motion in this Court in which the present application is contained.

*g* I have had some difficulty in understanding the arguments advanced by the plaintiff's Counsel. In effect, and as I understand it, the submission was that the interest created by the agreement aforesaid was not one which was recognised by the law and consequently the defendant had no caveatable interest in the land.

*h* Plaintiff's counsel submits that under s. 205 of the National Land Code only dealings which are capable of being effected under the Act are recognised by the Code and no others. The agreement in this case is submitted to be a dealing which is not specified in Parts 14-17 of the National Land Code.

*i* By way of authority plaintiff's counsel relies on *Haji Abdul Rahman v. Mohamet Hassan* [1917] AC 209. In that case an agreement in writing was made in 1895 providing that as security for a loan, land of which the debtor was registered as owner should be transferred to the creditor and it should be a condition of the agreement that if the debtor repaid the debt within 6 months the land should be re-conveyed to him; otherwise the agreement should

be void. The creditor presented the transfer of the land for registration and was duly registered as proprietor. In 1913 the debtor who had not repaid the debt sued to redeem the land. The Privy Council held that the title conferred upon the debtor no right in the land but merely a contractual right. And that consequently that even if the agreement should be construed as a continuing security for the debt the suit was barred by the Limitation Enactment.

*a*

Very heavy emphasis is placed by plaintiff's counsel on passages appearing in pp. 213 - 214 of that case. The burden of the plaintiff's counsel's submission is that these passages amount to a judicial recognition that the Jual Janji Agreement is one which the Courts do not recognise as being registrable and therefore such an agreement cannot create an interest in land.

*b*

With the greatest respect to plaintiff's counsel, it is my view, that this submission is wholly misconceived. The fact is that in *Haji Abdul Rahman's* case the agreement for the transfer of the land was recognised and was in fact protected by the registration of the creditor as proprietor.

*c*

What the Privy Council said was non-registrable was the obligation to permit redemption. This was so because although the real nature of the transaction was not a transfer but a mortgage, the form of that mortgage did not comply with Schedule E of the Registration of Titles Regulations 1891 and consequently could not be and was not registered. To cite the words of Lord Dunedin at p. 214:

*d*

Now the agreement under discussion was not in the form of Sched. E, and therefore could not be and was not registered. It is therefore clear that it conferred no real right in the land, which remained after the transfer duly registered as the unburdened property of the defendant.

The proper application of that case to the facts of the present case before me, therefore is that the defendant in the present case is still entitled if he wishes to register the transfer of the said land in his favour. That right is clearly an interest in the land and in my view a caveatable interest.

*e*

But the defendant cannot auction off the land or sell or dispose of it until he is registered as the proprietor thereof and the issue as to whether the loan agreement has expired in accordance with the tenure of the agreement must be left to be determined on a proper construction of the facts as they have crystallised at the time that issue falls to be considered.

*f*

But so far as the present application is concerned it is my view that the plaintiff's case is without merit and consequently this application is dismissed with costs.

Also found at [1985] 1 CLJ 169

*g**h**i*